

² Appellant submitted additional evidence with his appeal. The Board, however, is precluded from considering evidence that was not already part of the record when OWCP issued its final decision on September 10, 2015. Thus, it is precluded from receiving this evidence on appeal. 20 C.F.R. § 501.2(c)(1) (2014).

FACTUAL HISTORY

This case has previously been before the Board.³

The facts and circumstances set forth in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below. On April 12, 1994 appellant, then a 41-year-old welder, injured his left thumb and wrist in the performance of duty. OWCP accepted the claim for left thumb ulnar collateral ligament tear and authorized surgery. Appellant was unable to resume his regular duties as a welder.⁴ The employing establishment terminated his employment, effective October 28, 1994, and OWCP subsequently paid him wage-loss compensation for temporary total disability. In February 1995, OWCP referred appellant for vocational rehabilitation services.

In December 1997, appellant began working full time as a container maintenance mechanic (land base) with the International Longshoremen's Association (ILA). His private sector ILA job was a light-duty version of a welder's position, which his then-treating physician approved.⁵

By decision dated March 13, 1998, OWCP determined that appellant's full-time reemployment with ILA fairly and reasonably represented his wage-earning capacity. The decision noted that, effective December 7, 1997, appellant earned \$520.00 per week as a container maintenance mechanic. Because his current earnings with ILA were less than what he earned in his date-of-injury welder position, OWCP compensated him based on the loss of wage-earning capacity.⁶

³ Docket No. 13-1105 (issued July 23, 2013).

⁴ According to the latest statement of accepted facts (SOAF), the physical requirements of claimant's date-of-injury position as welder included standing, walking, stooping, bending, kneeling, climbing, and crawling. The April 21, 2011 SOAF also noted that work may be done in awkward and cramped positions, such as when welding in hard to reach places. Additionally, welders were noted to frequently handle objects weighing from 20 to 50 pounds and occasionally, objects weighing in excess of 50 pounds when setting up work and equipment for completion of assignments.

⁵ Appellant found the ILA position on his own, and began work on a trial basis, effective August 18, 1997. He worked for one week and afterward reported that he was able to perform the required physical tasks. Appellant also indicated that the ILA position was "less demanding" and "less strenuous" than his prior position with the employing establishment. On August 25, 1997 Dr. Howard L. Brilliant, a Board-certified orthopedic surgeon, provided two disability certificates. One certificate indicated that appellant "may return to work at new welding job." The other disability certificate noted that appellant "may return to work as [a] container maintenance mechanic...." Dr. Brilliant had previously examined appellant on August 5, 1997. Although appellant's work with ILA was initially sporadic, he eventually secured full-time work in early December 1997. During a December 16, 1997 follow-up visit, Dr. Brilliant noted that appellant's examination was basically unchanged. He indicated that appellant still had pain, limited motion of his thumb, and a flexion deformity. Dr. Brilliant also reported that appellant was currently working as a longshoreman.

⁶ The March 13, 1998 wage-earning capacity determination noted that appellant's earnings as a container maintenance mechanic represented 87 percent of the current wages of his date-of-injury position.

Appellant worked as a private sector container maintenance mechanic through October 2005. It is unclear why he stopped work entirely in October 2005. OWCP continued to pay wage-loss compensation based on the March 13, 1998 wage-earning capacity determination. In August 2009, it expanded appellant's claim to include left wrist post-traumatic degenerative arthritis.

When the case was last before the Board, OWCP had denied modification of its March 13, 1998 wage-earning capacity determination.⁷ On June 11, 2012 appellant's then-representative again requested modification of the wage-earning capacity decision as the evidence of record demonstrated a material change in the nature and extent of his injury-related condition. By decision dated October 1, 2012, OWCP denied his claim for additional wage-loss compensation.

Appellant appealed to the Board. In its July 23, 2013 decision, the Board found that he had not established a basis for modifying the March 13, 1998 wage-earning capacity determination.⁸ The Board reviewed the relevant medical evidence and the arguments presented and found that appellant had not met any of the three grounds for modification. Accordingly, the Board affirmed OWCP's October 1, 2012 decision.

Since issuing its last decision on October 1, 2012, OWCP referred appellant to Dr. James F. Bethea, a Board-certified orthopedic surgeon and second opinion physician, who provided results on examination on April 30, 2013. Dr. Bethea diagnosed left thumb ulnar collateral ligament tear. At the time, appellant indicated that he could not do anything with his left thumb. Grabbing and opening a door with his left thumb was reportedly impossible. Dr. Bethea determined that appellant's accepted condition was unresolved because it had progressed to osteoarthritis of the left thumb. He further stated that appellant could not return to work as a welder for the employing establishment.⁹

On April 9, 2014 a new representative for appellant filed a request for reconsideration/modification. Counsel resubmitted a June 17, 2009 left wrist imaging study. He also submitted a new December 11, 2013 report from Dr. Bright McConnell, III, a Board-certified orthopedic surgeon, who had previously conducted a second opinion evaluation on June 5, 2009.¹⁰

⁷ Modification is only warranted where the party seeking to modify an wage-earning capacity determination establishes either that there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous. 20 C.F.R. § 10.511.

⁸ *Supra* note 3.

⁹ Although Dr. Bethea was aware that appellant "accepted a light-duty assignment with the ILA for [approximately] eight years," he did not specifically comment on whether appellant was able to work in a light-duty capacity.

¹⁰ The Board's July 23, 2013 decision discussed in detail the results of Dr. McConnell's June 5, 2009 second opinion evaluation.

In his most recent December 11, 2013 report, Dr. McConnell diagnosed osteoarthritis of the left wrist and hand. He noted that when he last examined appellant in 2009, his then-restrictions precluded a return to his previous occupation as a welder. Dr. McConnell further noted that appellant “has been employed as a longshoreman since 1997.” He also reported that appellant’s “position is container maintenance mechanic.” According to Dr. McConnell, appellant had increasing problems with his left thumb and wrist, “causing difficulty completing his current work requirements.” Dr. McConnell noted that the primary purpose of the appointment was to determine appellant’s current work capacity. He explained that appellant had post-traumatic degenerative changes of his wrist, as well as the metacarpophalangeal (MCP) and carpometacarpal (CMC) joints of his left thumb. Dr. McConnell further explained that the 2009 work restrictions were intended to prevent repetitive wrist motion (less than 1 to 2 hours daily), and included a five-pound left hand lifting restriction. He noted that appellant had a significant compromise with respect to tasks requiring left hand repetitious grip or pinch activities. These restrictions remained current and were permanent in nature. Dr. McConnell further noted that he did not have access to a formal job description for a container maintenance mechanic position. He believed that if the container maintenance mechanic position description did not accommodate the above-noted left hand restrictions, then appellant would not be able to continue in that specific occupation.

In a May 8, 2014 decision, OWCP found the evidence of record insufficient to establish a material worsening of appellant’s accepted left thumb and wrist condition. Consequently, it denied modification.

On March 27, 2015 appellant again requested modification of the March 13, 1998 wage-earning capacity determination. He argued that the May 8, 2014 decision was erroneous because OWCP had not relied on a reasonably current medical examination in determining that the “constructed job of container maintenance mechanic” was medically suitable. Appellant noted that, while Dr. Brilliant resubmitted the two August 25, 1997 disability certificates,¹¹ appellant claimed that he had not physically examined him or reevaluated his functional capacity “at or about that time.” He claimed that the most recent physical examination was conducted on June 1, 1995, which was more than 2½ years prior to the March 13, 1998 wage-earning capacity determination.¹²

Appellant also submitted an April 24, 2014 letter from ILA Local 1422-A President, Leonard A. Bailey. He provided a general description of the duties of an ILA mechanic in the maritime industry. Mr. Bailey explained that mechanics performed maintenance/repair on intermodal chassis and containers, which included chassis tire maintenance/repair utilizing a 25-pound hammer and a ¾-inch impact gun. He also noted that tractor-trailer tires weighed approximately 75 pounds. Mr. Bailey further indicated that chassis repair required basic

¹¹ *Supra* note 5.

¹² The June 1, 1995 report appellant referenced was an impairment rating from Dr. Brilliant. At the time, he diagnosed gamekeeper’s thumb with secondary arthritis and thumb flexion contracture. He noted that appellant’s thumb was fairly useless the way it was. Dr. Brilliant recommended fusion of the MCP joint in a more functional position. He further noted that in appellant’s present condition, there was no way he could return to work as a welder. Dr. Brilliant found 80 percent impairment of the left thumb and 50 percent impairment of the hand. He also reiterated that appellant’s function would certainly improve if he had the joint fused.

electrical knowledge and welding and repairing containers involved using a 25-pound hammer to straighten steel panels that were 8' x 4' and an eighth of an inch thick. The steel panels and similarly sized sheets of flooring had to be manually lifted into place. Lastly, Mr. Bailey identified various tools utilized by mechanics and explained that the job required frequent bending, climbing, pushing, pulling, and lifting.

By decision dated May 26, 2015, OWCP denied modification of its March 13, 1998 wage-earning capacity determination. It explained that it had been based on appellant's actual earnings as a container maintenance mechanic, not a selected/constructed position he did not hold, and because the decision was based on his actual earnings, a reasonably current medical evaluation was not required.¹³ OWCP further noted that he had performed the ILA container maintenance mechanic position for nearly eight years, and there was nothing to suggest that this work, and the earnings derived from it, were not representative of his wage-earning capacity. Consequently, it found that appellant had not established a basis for modifying the March 13, 1998 determination. Because of a typographical error in the May 26, 2015 decision, OWCP made a minor correction and reissued the decision on June 8, 2015.

On June 16, 2015 appellant again requested modification. He indicated that he was submitting new medical evidence that established a change in his injury-related condition, thereby warranting modification of the March 13, 1998 wage-earning capacity determination.

In a report dated May 29, 2015, Dr. McConnell diagnosed osteoarthritis of the wrist and hand. He noted that appellant had post-traumatic degenerative changes of his wrist, as well as the MCP joint and CMC joint of his left thumb. Dr. McConnell further noted that appellant's work restrictions had not changed since he was last seen in 2013. He found that appellant could not perform the duties of an ILA mechanic -- maintenance/repair of intermodal chassis and containers. Dr. McConnell specifically noted that appellant was unable to use a 25-pound hammer and unable to lift 75-pound tractor-trailer tires. He further noted that appellant was unable to lift 8' x 4' steel panels as identified in the job description.

In a decision dated September 10, 2015, OWCP found that Dr. McConnell's May 29, 2015 report was insufficient to establish a material change in the nature and extent of appellant's injury-related condition. Consequently, it denied modification of the March 13, 1998 wage-earning capacity determination.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.¹⁴ A loss of wage-earning capacity determination is a finding that a specific amount of earnings, either actual

¹³ Nonetheless, Dr. Brilliant had examined appellant on August 5, 1997, approximately two weeks prior to his employment with ILA. He also saw appellant for follow-up on October 13 and December 16, 1997, at which time Dr. Brilliant noted appellant was currently working as a longshoreman.

¹⁴ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

earnings or earnings from a selected/constructed position, represents a claimant's ability to earn wages.¹⁵ Generally, an employee's actual earnings best reflect his wage-earning capacity.¹⁶ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹⁷

Compensation payments are based on these determinations, and OWCP's finding remains undisturbed until properly modified.¹⁸ Modification of a wage-earning capacity determination is unwarranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.¹⁹ The burden of proof is on the party seeking modification.²⁰

ANALYSIS

Appellant argues that the March 13, 1998 wage-earning capacity determination was issued in error. He argued that the newly submitted medical evidence established a change in his injury-related condition, thereby warranting modification of the March 13, 1998 wage-earning capacity determination. In response, OWCP reviewed Dr. McConnell's May 29, 2015 report and found this latest evidence insufficient to modify the March 13, 1998 decision. As noted, the burden of proof is on the party seeking modification of the wage-earning capacity determination.²¹

The record indicates that appellant worked as a container maintenance mechanic over an eight-year period from August 1997 until October 2005. Although he was actively involved in the vocational rehabilitation process, appellant secured the ILA position on his own.²² His then-treating physician, Dr. Brilliant, provided an August 25, 1997 disability certificate indicating that appellant "may return to work as [a] container maintenance mechanic...." At the time, he represented that the ILA position was "less demanding" and "less strenuous" than his prior position with the employing establishment. Appellant had been working approximately three months as a full-time container maintenance mechanic prior to OWCP's March 13, 1998

¹⁵ See *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁶ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹⁷ *Id.*

¹⁸ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

¹⁹ 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

²⁰ *Id.* at § 10.511.

²¹ *Id.*

²² Appellant informed his assigned vocation rehabilitation counselor of the position only after he had worked on a trial basis for one week in mid-August 1997. Moreover, he had already secured his physician's approval before he informed the counselor on August 23, 1997 of his recent return to work.

formal wage-earning capacity determination.²³ He continued to work as an ILA container maintenance mechanic for approximately eight years. It remains unclear why appellant left this position in October 2005 and there is no indication that he is currently employed.

When Dr. McConnell previously examined appellant on December 11, 2013, he was not privy to the specific requirements of appellant's job as a container maintenance mechanic. The wording of his report also strongly suggests that he was under the mistaken belief that appellant currently worked as a container maintenance mechanic. At the time, appellant reportedly stated that he was having increasing problems with his left thumb and wrist, which was "causing difficulty in completing his *current* work requirements." After outlining specific left hand limitations, Dr. McConnell stated that if the container maintenance mechanic position could not accommodate the noted restrictions, then appellant "would not be able to continue in that specific occupation."

In his report dated May 29, 2015, Dr. McConnell similarly noted that appellant "states that he has had increasing problems with his left thumb and wrist, causing difficulty in completing his *current* work requirements." The report noted that appellant "has been employed as a longshoreman since 1997." There is no mention of appellant's work stoppage in October 2005. Thus, it remains unclear whether Dr. McConnell realized that almost a decade had passed since appellant last worked as a container maintenance mechanic for the ILA. His apparent reliance on an inaccurate and/or incomplete employment history seriously undermines the probative value of Dr. McConnell's December 11, 2013 and May 29, 2015 reports.²⁴

Dr. McConnell's May 29, 2015 report also indicated that appellant could not perform certain ILA mechanic duties as outlined in Mr. Bailey's April 24, 2014 letter. Specifically, he noted that appellant could not use a 25-pound hammer, lift an 8' x 4' steel plate, or lift a 75-pound tractor-trailer tire. While this may be an accurate assessment of appellant's left upper extremity limitations with respect to the described duties, the current record does not demonstrate that appellant regularly performed these ostensibly restricted duties while employed by ILA from August 1997 through October 2005.

When appellant accepted the container maintenance mechanic position in August 1997, he represented that it was "less demanding" and "less strenuous" than his prior position with the employing establishment. At the time, OWCP's rehabilitation specialist described appellant's new position as a "light[-]duty version of a welder." Some of the duties Mr. Bailey described clearly exceed the physical requirements of appellant's date-of-injury welder position,²⁵ and as such, the described duties are inconsistent with appellant's previous representation that his new ILA job was less demanding and less strenuous. The Board notes that Mr. Bailey admittedly provided only a "general description" of what was required of an ILA mechanic. Mr. Bailey's

²³ Generally, a position will be deemed to represent the employee's wage-earning capacity after he has successfully performed the required duties for at least 60 days. *Supra* note 19 at Chapter 2.815.6(a) (June 2013).

²⁴ It is well established that medical reports must be based on a complete and accurate factual and medical background, and medical opinions based on an incomplete or inaccurate history are of little probative value. *See, e.g., B.R.*, Docket No. 16-0456 (issued April 25, 2016); *Douglas M. McQuaid*, 52 ECAB 382, 383 (2001).

²⁵ *See supra* note 4.

April 24, 2014 letter did not address appellant's specific employment history from August 1997 through October 2005 or even mention appellant by name. Thus, the Board finds this evidence insufficient to establish a modification of his 1998 wage-earning capacity decision.

The Board further finds that Dr. McConnell's May 29, 2015 report is insufficient to establish a material change in the nature and extent of appellant's injury-related condition such that he could no longer perform the duties of a container maintenance mechanic on or after October 2005. Consequently, appellant failed to establish a basis for modifying OWCP's March 13, 1998 wage-earning capacity determination.

CONCLUSION

Appellant has not established a basis for modifying OWCP's March 13, 1998 loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board